

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

GILBERTO GUDINO-MARTINEZ

Defendant.

NO. CR-02-0279-EFS

**ORDER DENYING DEFENDANT'S
MOTION TO MODIFY AND CORRECT
SENTENCE UNDER 18 U.S.C. §
3582 (c) (2)**

Before the Court is the Defendant's Motion to Modify and Correct Sentence Under 18 U.S.C. § 3582(c)(2), (Ct. Rec. 31), filed May 4, 2005. The Defendant seeks a reduction of his term of imprisonment on the grounds that his base offense level was unconstitutionally enhanced by sixteen levels and his criminal history score should not have been fifteen points because such "enhancements" were not submitted to a jury. After reviewing the motion, 18 U.S.C. § 3582, and relevant case law, the Court is fully informed and denies the Defendant's motion

"The authority of district courts to correct or reduce sentence is limited." See *United States v. Mullanix*, 99 F.3d 323, 324 (9th Cir. 1996). Section 3582(c) of Title 18 provides:

The court may not modify a term of imprisonment once it has been imposed except that-

1 (2) in the case of a defendant who has been sentenced to
2 a term of imprisonment based on a sentencing range that
3 has subsequently been lowered by the Sentencing
4 Commission pursuant to 28 U.S.C. § 994(o), upon motion of
5 the defendant . . . , the court may reduce the term of
imprisonment, after considering the facts set forth in
section 3553(a) to the extent that they were applicable,
if such a reduction is consistent with applicable policy
statements issued by the Sentencing Commission.

6 The Defendant's sentencing guideline range, 77-96 months, was reached
7 after considering the Defendant's "Offense Level" and "Criminal History
8 Category" under the United States Sentencing Guidelines ("Guidelines")
9 Sentencing Table. The Court determined the Defendant's Total Offense
10 Level was 21, after considering Guidelines § 2L1.2(a), which specifies
11 that the Base Offense Level for "Unlawfully Entering or Remaining in the
12 United States" is 8. The Court then applied a sixteen-level enhancement
13 under § 2L1.2(b)(1)(A), finding that the Defendant previously was
14 deported, or unlawfully remained in the United States, after a conviction
15 for a crime of violence--second degree assault. The Defendant received
16 a three-level reduction for Acceptance of Responsibility under §§
17 3E1.1(a) and (b), resulting in a Total Offense Level of 21.

18 The Court utilized the 2002 Guidelines at the Defendant's May 21,
19 2003, Sentencing Hearing. Neither the 2003 nor the 2004 Guidelines
20 change the calculations above . Accordingly, the "Offense Level"
21 variable considered by the Court in determining the guideline range has
22 not changed, or more specifically has not lowered the sentencing
23 guideline range.

24 Furthermore, the "Criminal History" variable has not been modified.
25 The Sentencing Guidelines have not changed the number of points to be
26 assigned to certain kinds of previous offenses. Therefore, the Court

1 finds the Defendant's term of imprisonment is not based on a sentencing
2 range that has subsequently been lowered.

3 The Defendant referenced *Apprendi v. New Jersey*, 530 U.S. 466
4 (2000), *Blakely v. Washington*, 124 S. Ct. 2531 (2004), *Booker v. United*
5 *States*, 125 S. Ct. 738 (2005), and *Shepard v. United States*, 125 S. Ct.
6 1254 (2005). *Apprendi* was decided prior to this Defendant's sentence and
7 was considered by the Court at sentencing. The other cases were decided
8 by the Supreme Court following the Defendant's sentencing, however, the
9 Court finds these cases do not apply to the Defendant's 18 U.S.C. §
10 3582(c)(2) motion. All of these cases were pronouncements of the United
11 States Supreme Court and not the United States Sentencing Commission.
12 *United States v. Green*, --- F.3d ---, 2005 WL 1060608 (10th Cir. 2005);
13 *United States v. Chappell*, --- F. Supp.2d ---, 2005 WL 806702, *1 n.1 (D.
14 Kan. 2005) (concluding there is no *Booker* relief under 18 U.S.C. §
15 2852(c)(2)); *United States v. McBride*, 283 F.3d 612, 615-16 (3d Cir.
16 2002) (holding no *Apprendi*-premised § 3852(c)(2) relief); *Shafer v.*
17 *United States*, 2005 WL 850842 (D. Me. 2005). Furthermore, *Booker* did not
18 alter the rule that the Court is able to make determinations concerning
19 the fact of a prior conviction for purposes of sentencing. For these
20 reasons, the Defendant cannot seek a reduction of his term of
21 imprisonment under 18 U.S.C. § 3852(c)(2). Accordingly, **IT IS HEREBY**
22 **ORDERED:** Defendant's Motion to Modify and Correct Sentence Under 18
23 U.S.C. § 3582(c)(2), (**Ct. Rec. 31**), is **DENIED**.

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1 **IT IS SO ORDERED.** The District Court Executive is directed to enter
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3 this Order and provide a copy to the Defendant and the Government.

4 **DATED** this 12th day of May, 2005.

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6 S/ Edward F. Shea
7 EDWARD F. SHEA
 United States District Judge

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